

SELENA CHRISTMAS,)	
)	
Complainant,)	ADMINISTRATIVE ACTION
)	
v.)	FINDINGS, DETERMINATION
)	AND ORDER
BERKELEY COLLEGE,)	
)	
Respondent.)	

Charles Cohen, Deputy Attorney General, for the Division on Civil Rights
(Anne Milgram, Attorney General of New Jersey, attorney).

INTRODUCTION

This matter is before the Director of the New Jersey Division on Civil Rights (Division) pursuant to a verified complaint filed by the complainant, Selena Christmas (Complainant), alleging that the respondent, Berkeley College (Respondent), subjected her to unlawful discrimination in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. On September 25, 2008, the Honorable Mumtaz Bari-Brown, Administrative Law Judge (ALJ), issued an initial decision dismissing the complaint, finding that Complainant did not demonstrate that Respondent subjected her

to unlawful disability discrimination in violation of the LAD. Having independently reviewed the record, the Director adopts the ALJ's decision as modified herein.

PROCEDURAL HISTORY

On February 6, 2007, Complainant filed a verified complaint alleging Respondent refused to accommodate her physical disability in violation of the LAD. Specifically, Complainant alleged that she had had right shoulder arthroscopic surgery for rotator cuff and lateral tears. She further claimed that Respondent denied her request to use a recorder in class, and later refused to allow her to make up an exam on the day following the scheduled test date. Both requests were made to accommodate her disability. Complainant alleged that Respondent's denial of these requests prevented her from completing the research and writing class in which she had enrolled.

On April 12, 2007, Respondent filed an answer denying the allegations and requesting mediation. This request was granted on April 16, 2007. An unsuccessful mediation was held on June 19, 2007, and the case was transferred to the Office of Administrative Law (OAL) on August 17, 2007 at the request of Complainant. Hearings were originally scheduled for March 17 and 18, 2008, but were later adjourned to April 1, 2008. Subsequent to the hearing, Respondent submitted a post-hearing brief, and the record was closed on July 1, 2008¹. On September 29, 2008, the ALJ issued her initial decision dismissing the complaint.² Neither party submitted exceptions to the initial decision. Before the Director's Order was due to be issued, the ALJ granted the Director's request for an extension and the Director's Order is now due on December 26, 2008.

¹ Complainant appeared pro se throughout the proceedings until July 31, 2008, when Evan Goldman, Esq. entered an appearance on her behalf.

² Hereinafter, "ID" shall refer to the ALJ's initial decision issued on September 29, 2008; "P" shall refer to Complainant's exhibits; and "R" shall refer to Respondent's exhibits.

THE ALJ'S DECISION

The ALJ's Findings of Fact

The ALJ provided a summary of evidence presented at the hearing which may be condensed as follows. On or about September 26, 2006, Complainant enrolled in a legal research and writing course taught by Professor Deborah Ranges, Chair of the Legal Studies Department (hereinafter "Ranges"). Due to illness, Complainant missed several classes in the beginning of the term. ID-3. The absences began on September 30, 2006, when Complainant was treated for tendonitis in her foot at Hackensack Medical Center Emergency Department. The "return to school instructions" predicted that she should be able to return to school in four days, with the limitation of "partial weight bearing on right foot." Later, on October 15, 2006, Complainant was treated for bronchitis at Hackensack Medical Center Emergency Department, and the return instructions predicted that she "should be able to return to school in 3 days" with no other limitations. ID-10. Finally, on November 22, 2006, Complainant underwent planned right shoulder arthroscopic surgery for a condition originally diagnosed on March 4, 2004. In a letter dated December 7, 2006 and signed by John Katona, M.D., it was noted that Complainant "will have chronic pain and limited mobility for the next several months. A tape recorder has been suggested [instead of note-taking in class], as she [will be] unable to write for an extended period, this will alleviate some of the discomfort." ID-11.

Complainant testified that she had informed Respondent of her disability concerning her hand when she first enrolled and that, notwithstanding, Ranges denied her requests to use a tape recorder and, later, to re-schedule a midterm exam. ID-4. Complainant stated that after her shoulder surgery, pursuant to the recommendation of Dr. Katona, she requested to tape the class lecture and attempted to show Ranges the "hospital records" after her first extended absence, but Ranges refused to look at them. Instead, Ranges suggested that Complainant drop the class due to many missed

classes, and refused her request to tape the class lecture. ID-3.

After Complainant missed several classes, Ranges advised Complainant on October 18, 2006 via email that she felt "compelled to express [her] concern regarding the number of classes [Complainant] missed..." and that Complainant "seemed uninterested and convinced of the fact that [she] could make up the work..." Ranges noted that "to date you have missed 10 ½ hours out of a total of 14 hours of class." ID-5, P-1. Ranges maintained that Complainant never complained about pain in her right arm or shoulder when she returned to class from her several weeks of absence. ID-5. Subsequently, on December 18, 2006, in response to a request made by Complainant for a grade change, Ranges again advised Complainant via email that "you were absent 4 out of 11 weeks of class which is a total of 14 hours of instruction." ID-7.

Ranges also testified that the legal research and writing class does not lend itself to being recorded, as it is a "hands-on" class that requires students to do research in the law library with the lectures being only a small component of the course work. Further, each class reviews and builds upon the material covered in the prior class. As Complainant had already missed several classes, the use of a tape recorder would have unfairly enabled her to record answers to assignments that she had not yet completed. ID-6.

Complainant testified that on the day of a scheduled mid-term exam, she asked Ranges to excuse her from taking the exam and instead provide her a make-up exam at a later date. ID-3. Complainant testified that she told Ranges she was in pain and had difficulty writing, and that Ranges wrongfully denied her permission to take a make-up mid-term exam. ID-3-4. For her part, Ranges testified that Complainant raised her voice, demanded a make-up exam, and told Ranges that she was unprepared to take the exam. Complainant denied these charges, ID-4,6, and testified that Ranges singled her out with "a tirade of verbal assaults in front of the entire class for no reason at all." ID-11.

Jennifer Talluto was another student in the legal research and writing class. ID-4. She testified that she was ill on the date of the exam and that on the following date Ranges allowed her to make up the exam. ID-4. However, Ranges testified that Talluto had been excused because she informed her she had been stuck on a highway waiting for transportation, and that another student, Mahlen, was also excused because of transportation problems. ID-6, footnote 3.

On November 13, 2006, Ranges sent Complainant a progress report which stated that Complainant was failing the course due to lack of preparation, incomplete and unsatisfactory assignments, poor test grades and excessive absences. On December 5, 2006, after the mid-term exam held on November 7, 2006, Complainant appeared in Ranges' class with her arm in a sling and a medical note. Complainant subsequently received a final grade of 52 for the course, which she appealed. ID-6. In an email dated December 18, 2006, Ranges explained that Complainant's request for a grade change was denied:

1. Students who don't attend class are not permitted to use tape recorders. You are not the only student who made this request and was denied. Your injury was not made known to me until weeks into the quarter. Further, 75% of each class consisted of library assignments. A tape recorder would not have been of any use for that portion of the class....
2. In order for me to have taught you the "fundamental basics of the course" it would have been necessary for you to attend class. You were absent 4 out of 11 weeks of class which is a total of 14 hours of instruction. Please refer to my email to you dated October 18th whereby I expressed my concerns regarding the excessive number of classes that you missed. I specifically indicated in that email that you missed all of manual legal research and writing and legal citation lectures, exercises and quizzes. I am not surprised that you feel that you did not learn the basics. You most certainly did not, but it was no fault of mine.
3. Make-up examinations are given at my sole discretion. It has been my practice that if a student has a medical... emergency... I allow a make-up. You... approached me 15 minutes before the scheduled midterm and informed me that you would not be taking the exam because you didn't have a textbook... (or) the class notes.

Ranges also advised Complainant that she had given her "preferential" treatment in allowing her to hand in assignments late without penalty, and also allowed her to make

up quizzes. ID-7-8.

Respondent also presented a statement from the Chair of Finance and Accounting, who claimed that while in her office on the night of November 7, 2006, she heard a student "yelling belligerently at Deborah, 'I am not taking the midterm tonight because I just bought the textbook and don't know the material.' The student continued to scream and became more and more agitated." ID-8. Two other faculty members corroborated this statement, testifying that Complainant's behavior toward Ranges during this discussion had been "disrespectful and rude," and characterizing Complainant as "volatile." They also said they had overheard Complainant "demand(ing)" that Ranges schedule a make-up exam. ID-9.

Complainant subsequently filed a complaint against Ranges with Edwin Hughes, Respondent's Dean of Student Development and Campus Life. ID-9. In a letter dated November 13, 2006, Hughes addressed Ranges' denial of Complainant's request for a makeup mid-term exam, advising Complainant that:

You have been engaged in disruptive behavior. If you continue this disruptive and disrespectful behavior, you will be subject to disciplinary action up to and including dismissal from Berkeley College.

Lynda Kubicka, a student with disabilities, was also enrolled in the class and notified Ranges during the first week of class of her disabilities. Ranges denied her request to use a tape recorder. Kubicka heard Complainant complain of pain. She believed Complainant was prepared to take the mid-term exam because they studied together. Kubicka further testified that Ranges never discussed Complainant's personal situation before the class, nor did she make any personal remarks to or about Complainant. Kubicka acknowledged, however, that Ranges asked Complainant to consider repeating the class. ID-4.

Richard Waldron, a psychologist and nurse practitioner specializing in mental

health, testified that he has been treating Complainant for mild depression and general anxiety disorder since 2004. ID-4. He believed her to be a good and diligent student, and he said that she had told him that the pain in her arm made it difficult for her to take notes in class. ID-4-5. He also believed that Complainant failed Ranges' class because she was denied the use of a tape recorder. ID-5. Complainant repeated the course and earned a "C". Waldron further believed that Complainant suffered humiliation because she did not graduate from Respondent with her entering class. On July 12, 2005³, Complainant had been issued a Notice of Award from the Social Security Administration recognizing her as "disabled under our rules on February 6, 2004 due to diagnoses of spinal disc disease, right shoulder impairment, irritable bowel syndrome and depressive and anxiety disorders." ID-15.

Based on a review of the relevant evidence, the ALJ made the following findings of fact:

1. On March 4, 2004, Christmas was diagnosed with right shoulder pain, radiculopathy. P-10.
2. On July 12, 2005, the Social Security Administration issued a Notice of Award to Selena Christmas, which states in part, "We found that you became disabled under our rules on February 6, 2004." P-5.
3. In September 2005, Christmas filled out a Federal Aid Application to attend Berkeley College. P-16.
4. On several occasions while enrolled at Berkeley, Christmas sought medical treatment from Hackensack Medical Center for various ailments. P-5; P-6; P-7.
5. On September 30, 2006, Christmas was treated for tendonitis at Hackensack Medical Center Emergency Department. The "return to school instructions" predicted that she should be able to return to school in four days with the following limitations: "partial weight bearing on right foot." P-6.
6. On October 15, 2006, Christmas was treated for bronchitis⁴ at Hackensack Medical Center Emergency Department. The "return to school instructions"

³ The initial decision incorrectly states the date of this determination to be June 10, 2005.

⁴ "This is an inflammation in the large air tubes leading to the lungs. The most common symptom is a lasting

mention no limitations, but predicted that she “should be able to return to school in 3 days.” P-7.

7. On October 30, 2006, Eastern Orthopedic Associates examined Christmas and scheduled a surgical procedure on her right shoulder for November 22, 2006. P-8; P-9.

8. On December 7, 2006, John Katona, M.D., prepared a letter stating, “To Whom It May Concern: S.C. is under my orthopedic care. She had right shoulder arthroscopic surgery on November 11, 2006. She will have chronic pain and limited mobility for the next several months. A tape recorder for class has been suggested, as she is unable to write for an extended time period, this will alleviate some of the discomfort.” P-12.

[ID-10-11].

THE ALJ’S LEGAL CONCLUSIONS

Complainant alleged that Respondent unlawfully discriminated against her based upon her disability. According to the ALJ, the courts have applied a broad interpretation to the term “disability”, including “people who do not have a substantial or permanent impairment at the time of the alleged discrimination.” ID-14, citing Soules v. Mount Holiness Memorial Park, 354 N.J. Super. 569, 575 (App. Div. 2002). As the record amply supports that Complainant suffered from pain in her right arm/shoulder as a result of an impairment during the period she attended Ranges’ class, the ALJ concluded that Complainant demonstrated that she was disabled within the meaning of the LAD. The ALJ further concluded that Respondent is a place of public accommodation under the LAD since it defines a place of public accommodation to include “... any kindergarten, primary and secondary school, trade or business school, high school, academy, college and university, or any educational institution under the supervision of the State Department of Education” ID-14-15, citing N.J.S.A. 10:5-5(l).

cough. Acute bronchitis often follows a common cold or other respiratory infection. Bronchitis can develop into pneumonia [and] usually last[s] 7-10 days.” P-7.

The ALJ next noted that a complainant has the burden of initially establishing a prima facie case of discrimination. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). The ALJ analyzed Complainant's claim using legal standards applicable to a disability-based employment discrimination claim. Thus, in a case alleging disability discrimination, a prima facie case is found to exist where an employee can prove that: (1) she has a disability; (2) she was performing the job at a level that met the employer's legitimate expectations; (3) she nevertheless was fired; and (4) the employer sought someone else to perform the work. Clowes v. Terminix, 109 N.J. 575, 597 (1988).

The ALJ observed that a prima facie case establishes a presumption that the employer unlawfully engaged in discrimination. ID-13, citing Anderson v. Exxon Co., 89 N.J. 483, 491 (1982). The ALJ then stated that the burden of going forward is shifted to the employer who must then show a legitimate, non-discriminatory reason for rejecting the employee. Ibid. If the employer can satisfy this burden, the complainant is then required to prove by a preponderance of the evidence that the employer's proffered reason is a pretext for discrimination. ID-14. Under McDonnell Douglas, the complainant retains the burden of persuasion at all times; only the burden of production shifts. Moreover, a complainant is required to do more than simply show that the employer's proffered reason for the adverse action was false. Viscik v. Fowler Equipment, 173 N.J. 1, 14 (2002). A complainant must also show that the employer's reason was motivated by discriminatory intent. ID-14.

Turning to the issue of reasonable accommodation, the ALJ stated that a place of public accommodation must make such reasonable modifications in policies, practices, or procedures, as may be required to afford goods, services, facilities, privileges, advantages, or accommodations to a person with a disability, unless the owner... or employee of the place of public accommodation demonstrates that making the accommodations would impose an undue burden on its operation." ID-16, citing

N.J.S.A. 13:13-4.11. In determining whether an accommodation would impose an undue burden on the place of public accommodation thereby rendering it unreasonable, factors to be considered include the overall size of the business, the nature and cost of the accommodation sought, and whether the accommodation sought will result in a fundamental alteration to the goods, services, program or activity offered. Ibid.

The ALJ was persuaded by credible evidence that Respondent had established a legitimate reason for refusing to allow Complainant to use a tape recorder in class when she returned to school in October 2006. The evidence indicated that Complainant had been treated for tendonitis and bronchitis, and Ranges credibly testified that she had not been advised of Complainant's arm or shoulder disability until December 2006. ID16, P-12. Moreover, a tape recorder would be of little or no value, as seventy-five percent of the class required "hands-on" participation in the law library. ID-17. The ALJ was thus persuaded by Respondent's credible evidence that the denial of the use of a tape recorder for the legal research and writing class was not a violation of the LAD.

The ALJ also credited Respondent's reasons for refusing to reschedule the mid-term exam for Complainant. It was Ranges' determination that Complainant was unprepared for the exam due to lack of preparation, unsatisfactory and incomplete assignments, and excessive absences. The burden of production then shifted to the complainant to show that the reasons given were pretextual. The complainant may show pretext through "weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions" in the respondent's reasons for its actions. ID-17, citing Deweese v. RCN Corp., 380 N.J. Super. 511, 528 (App. Div. 2005).

The ALJ concluded that Complainant has not provided any evidence, direct or circumstantial, that casts doubt upon Respondent's proffered legitimate reasons. Additionally, the ALJ found no evidence to support a finding that a discriminatory reason

was more likely than not a motivating factor or determinative cause of Ranges' action. ID-17, citing Zive v. Stanley Roberts, 182 N.J. 436, 455-56 (2005).

Based on the totality of the evidence, the ALJ concluded that Respondent gave non-discriminatory reasons for denying Complainant's request to use a tape recorder in the legal research and writing class. Further, the ALJ concluded that Respondent gave non-discriminatory reasons for denying Complainant's request to reschedule an exam. Thus, the ALJ concluded that Complainant did not meet the burden of showing that Respondent's proffered reasons were pretextual, and ordered that the complaint be dismissed. ID-17-18.

THE DIRECTOR'S DECISION

THE DIRECTOR'S FACTUAL FINDINGS

After a review of the record, the Director concludes that the ALJ's factual findings as recited herein are supported by sufficient evidence, and he adopts them as his own. The ALJ did not make any general findings with regard to the credibility of either Complainant's or Respondent's witnesses. However, the ALJ did find that Ranges credibly testified that she did not know of Complainant's shoulder injury until December 2006 and, further, that her reasons for denying Complainant's request to use a recorder were credible. ID-16. Moreover, the ALJ noted that Complainant's claim that Ranges had "publicly humiliated" her in front of the whole class was refuted by a fellow student, and Ranges' assertion that Complainant "became irate, screamed, and demanded a make-up exam" – an assertion denied by Complainant - was corroborated by three other faculty members who were within earshot.

Under the Uniform Administrative Procedure Rules, the Director may reject or modify the ALJ's findings of fact, but must clearly state the reason for doing so. N.J.A.C. 1:1-18.6(b). Moreover, it is well settled that an agency head must give due deference to the ALJ's factual determinations because the ALJ had the opportunity to hear the live

testimony of witnesses, observe their demeanor, and judge their credibility. Clowes v. Terminix, supra at 587-88. Thus, an agency head may not reject or modify any finding of fact based on the credibility of a lay witness unless it first determines from a review of the record that the finding is arbitrary, capricious or unreasonable, or is not supported by sufficient, competent, and credible evidence in the record. N.J.A.C. 1:1-18.6(c). Neither Complainant nor Respondent has filed exceptions, and an independent review of the record reveals no basis to modify the ALJ's factual findings.

THE DIRECTOR'S LEGAL ANALYSIS AND CONCLUSIONS

The LAD prohibits discrimination against people with disabilities in places of public accommodation. N.J.S.A. 10:5-12(f). The LAD's definition of disability includes any physical disability or infirmity which is caused by bodily injury. The ALJ correctly concluded that Complainant had a disability covered by the LAD. N.J.S.A. 10:5-5(q). Further, the LAD defines "public accommodation" to include "any kindergarten, primary and secondary school, trade or business school, high school, academy, college and university, or any educational institution under the supervision of the State Board of Education, or the Commissioner of Education of the State of New Jersey. N.J.S.A. 10:5-5(l). See also N.J.A.C. 13:13-4.3(a). Therefore, the record clearly supports the ALJ's conclusion that Complainant is a person with disabilities and that Respondent is a place of public accommodation as defined by the LAD.

The LAD generally makes it unlawful for any place of public accommodation, either directly or indirectly, to refuse, withhold from, or deny an individual with a disability access to any of the services, privileges, or advantages thereof on the basis of that person's disability. N.J.S.A. 10:5-12(f); see also N.J.A.C. 13:13-4.3(a). Regulations promulgated under the LAD place certain requirements on those places of public accommodation which offer examinations or courses related to applications, licensing, certification or credentialing for secondary or post-secondary education, professional or

trade purposes. These facilities must ensure that when an examination is selected and administered to a person with a disability that impairs sensory, manual or speaking skills, the examination results accurately reflect the individual's aptitude or achievement level, or whatever other factor the examination purports to measure, rather than reflecting the individual's impaired sensory, manual or speaking skills. N.J.A.C. 13:13-4.2; N.J.A.C. 13:13-4.5.

Moreover, the LAD requires a place of public accommodation to make "reasonable accommodations to the limitations of a patron with a disability" unless the owner, employee, or agent of the public accommodation can show that such accommodations would impose an undue burden on its operation. N.J.A.C. 13:13-4.11(a). Such reasonable accommodations may include reasonable modifications in policies, practices, or procedures as may be required to afford the services, privileges, or advantages of the public accommodation to the person with a disability. Ibid.

Similar to employment discrimination cases, an informal interactive process must be initiated to determine what accommodation is necessary and appropriate. This process is crucial, in that each party generally holds relevant information that the other party is not aware of, and the exchange of such information will ensure that the employer's assessment of potential accommodations is both complete and reasonable. See, e.g., Taylor v. Phoenixville School District, 184 F.3d 296, 317 (3rd Cir. 1999). Once a person with a disability has requested assistance, the public accommodation must make a reasonable effort to determine the appropriate accommodation.

The Appellate Division has articulated standards for evaluating a claim that a covered entity violated the reasonable accommodation requirements of the LAD by failing to engage in a good faith interactive process. Tynan v. Vicinage 13 of the Superior Court of New Jersey, 351 N.J. Super. 351, 400-401 (App. Div. 2002). In order to prevail in such a claim, a plaintiff must show that "(1) the [public accommodation]

knew about [the patron's] disability; (2) the [patron] requested accommodation or assistance for his or her disability; (3) the [public accommodation] did not make a good faith effort to assist [the patron] in seeking accommodation; and (4) the [patron] could have been reasonably accommodated but for the [public accommodation's] lack of good faith." Jones v. Aluminum Shapes, Inc., 339 N.J. Super. 412, 423 (App. Div. 2001), citing Taylor, *supra*, at 319-320.

Applying these standards to the facts of this case, the Director finds that Respondent did not fail to engage in a good faith interactive process with Complainant as required by the LAD. Complainant claimed that she advised Respondent about her hand disability upon enrolling in September 2006. However, the ALJ found that Respondent was not made aware of Complainant's arm/shoulder injury and pain until after Complainant underwent surgery on November 11, 2006 which was *after* the exam date of November 7, 2006; the previous medical absences and notes given to Ranges concerned Complainant's tendonitis and bronchitis and thus were not related to any difficulty Complainant may have had in writing.

Complainant alleged that Respondent's denial of her use of a tape recorder is an unlawful denial of a reasonable accommodation. However, the record shows that this request was not accompanied by any notice of an injury or pain, nor was it a reasonable accommodation that would have made any appreciable difference in Complainant's performance in the class. Respondent's undisputed testimony as to the hands-on nature of the class, in that it requires a majority of the student's time to be spent conducting research and writing in the law library, and that the lecture portion of the class is but a small component of the course curriculum, establishes that the use of a tape recorder in class would be of little or no value. Further, as each class builds upon and reviews material covered in the prior class, it was established through testimony that allowing Complainant the use of a tape recorder during the classroom portion of the course would

have provided the opportunity to record answers to assignments she had not yet completed. ID-6. This would have given Complainant an unfair advantage over the other students in the class who had not missed classes and had actually performed the work required. In other words, this particular accommodation was not reasonable, and would have been neither meaningful nor effective. The Director also finds that, under the circumstances, Complainant's mere request to use a tape recorder without medical justification is not sufficient to trigger the interactive process⁵.

Complainant also alleged that Respondent's refusal to allow her a make-up midterm exam constitutes an unlawful denial of a reasonable accommodation. However, credible testimony established that Complainant requested a make-up exam because she was unprepared to take it as originally scheduled, and not as a result of any disability. ID-8-9, R-2,4. There is no evidence in the record to establish that Ranges was aware of Complainant's disability or that Complainant asked for a make-up exam as an accommodation for her disability. Instead, Ranges' decision to refuse this request was based on legitimate concerns about Complainant's prior attendance and class performance. Therefore, the Director concludes that the refusal to grant Complainant's request for a make-up exam does not constitute a denial of a reasonable accommodation in violation of the LAD.

Although not specifically pled in her complaint, Complainant implicitly alleged that she was subjected to differential treatment by comparing her treatment to that of Talluto and Mahlen, and arguing that they were similarly situated yet allowed to make up the exam. However, as demonstrated through the undisputed testimony of Ranges, Complainant, Talluto and Mahlen were not in fact similarly situated. There is nothing in the record to indicate that either Talluto and Mahlen had missed the number of classes a

⁵ The use of a tape recorder was not suggested by Dr. Katona until his letter dated December 11, 2006, at which time the semester was almost over.


Complainant had, nor is there anything to suggest that it was an abuse of Ranges' discretion to grant Talluto's or Mahlen's requests. The emergent transportation circumstances present in connection with Talluto's and Mahlen's requests were not reflected in Complainant's request, and there is insufficient evidence to establish that Complainant advised Ranges of any medical emergency or condition concerning her writing abilities prior to or at the time of her request. Rather, credible testimony established that Complainant requested a make-up exam because she was unprepared to take it as originally scheduled, and not as a result of any disability. ID-8-9, R-2,4. Ranges' decision to refuse this request was based on legitimate concerns about Complainant's prior attendance and class performance, and this refusal to grant Complainant's request for a make-up exam does not constitute a denial of a reasonable accommodation. The Director concurs with the ALJ that "complainant has not met the burden of showing that the respondent's proffered reasons are pretextual." Therefore, the Director finds there is sufficient credible evidence in the record to support the ALJ's findings and, accordingly, concludes that Complainant has failed to establish that Respondent's decision to deny Complainant's request to reschedule an exam was influenced by unlawful discrimination.

After a careful review of the record, the Director concludes that Complainant has failed to establish that Respondent's denial of Complainant's requests to use a tape recorder in class and to reschedule an exam constituted an unlawful denial of reasonable accommodations by a public accommodation. Further, Complainant has not met her burden of showing that Respondent's articulated reasons for its actions were not its true motivation, and that she was discriminated against because of her disability. See Cortes v. Univ. of Medicine and Dentistry of New Jersey, 391 F. Supp. 2d 298, 311-312 (D.N.J. 2005).

ORDER AND CONCLUSION

Based on the foregoing, the Director concludes that Complainant has failed to establish that Respondent engaged in unlawful disability discrimination in violation of the LAD and, therefore, he adopts the ALJ's initial decision dismissing this complaint as modified herein.

DATE: 12/22/08



J. FRANK VESPA-PAPALEO, ESQ., Director
New Jersey Division on Civil Rights

